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Torts

Henry Summerall Jr.
Henderson, Salley & Cushman (Aiken, SC)

TORTS

HENRY SUMMERALL, JR.*

Contrary to most years, many of this year's cases decided in the period covered by this Survey cover important substantive principles of the law of Torts.

CRIMINAL CONVERSATION

This year's most interesting case, *Fennel v. Littlejohn*,[1] illustrates several points, some legal, and some moral. This suit based on the heretofore obscure theory of criminal conversation involved these facts: The plaintiff separated from his wife in October, 1959, because of her adultery with one Erickson and instituted divorce proceedings against her, the plaintiff continuing to provide a home and maintenance for her. Upon recommendation of the plaintiff, his wife was employed by the defendant to do office work. A hearing was held in the divorce action on January 5, 1960, and on January 8, 1960, the master held a conference with the plaintiff and his wife in an attempt to effect a reconciliation, but was unsuccessful. On March 25, 1960, the defendant was caught in the act of adultery with the plaintiff's wife in the home the plaintiff was providing for her. Thereafter, the divorce proceeding was re-opened to name the defendant as a co-respondent to the wife's adultery, and the final divorce decree was granted on April 29, 1960, finding the wife guilty of adultery with the defendant and two others.

In the suit which was instituted for the tort of criminal conversation, the plaintiff recovered a verdict of 2,000.00 dollars, actual damages and 16,000.00 dollars punitive damages, later reduced by the trial judge to 8,000 dollars.

The Supreme Court upheld the verdict and laid down the law of criminal conversation which may be stated as follows:

> Criminal conversation means adulterous relations between the defendant and the spouse of the plaintiff. . . . And to sustain the action it was necessary for the plaintiff to establish two things, namely: (1) The marriage between the spouses, and (2) sexual intercourse between the defendant and the wife during coverture. . . . Alienation or loss of

* Henderson, Salley & Cushman, Aiken, South Carolina.

1. 240 S.C. 189, 125 S.E.2d 408 (1962).

> affections is not a necessary element of the action . . . [citations omitted].[2]

Although actions for alienation of affections and for criminal conversation are alike in that they both arise from the marital relation and are both torts against the right of consortium, they are nevertheless essentially distinct in that criminal conversation necessarily requires adultery while alienation of affections does not. Proof of pecuniary damage is not necessary to sustain the action of criminal conversation.

Although the common law action for criminal conversation has apparently long been recognized in this state, this is only the third case which has been presented on appeal, the first two being very old cases.

In upholding the judgment the court placed great reliance upon the authorities which indicate the strong public policy of this state relating to marriage and the high regard in which our law holds the marriage relationship or status. The court struck down the defendant's principal defense to the action with the following statement:

> While the authorities are not in agreement, we think the better rule is that proof of the prior separation of the parties and lack of affection between them are matters in mitigation of damage, but are not fatal to the cause of action. Neither does the fact that the plaintiff obtained a decree of divorce from his wife subsequent to the alleged adulterous act constitute a bar to the action.[3]

This case illustrates the tenacious power and strength of the common law in which an appropriate factual situation can invigorate nearly forgotten doctrines and obscure precedents. It also illustrates the results which a resourceful advocate can obtain.

WIFE'S LOSS OF HUSBAND'S CONSORTIUM

Page v. Winter[4] holds that no cause of action exists in favor of a wife to recover damages for loss of the consortium of her husband due to injuries negligently inflicted upon him. The majority of three justices reasoned in a short opinion that recovery in such cases was not permitted under the common law, and the Supreme Court, therefore, had no right to repudiate the

2. *Id.* at 195, 125 S.E.2d at 412.
3. *Id.* at 198, 125 S.E.2d at 413.
4. 240 S.C. 516, 126 S.E.2d 570 (1962). Note, 15 S.C.L. REV. 810.

common law rule even though it may be illogical, undesirable or wrong, any change in the rule being for the legislature.

In an extensive and well-reasoned dissent by Mr. Justice Bussey, it was argued that the legal right of the wife to the consortium of the husband has been recognized by the decisions of this state,[5] and that the wife's right to recover for the intentional invasion of her right to her husband's consortium has been recognized and enforced.[6] Therefore the plaintiff should be allowed to recover for a negligent invasion of this right, any bar to such action having been removed by the Married Women's Act which completely removed the disability of coverture.

BAILMENTS—LIABILITY OF BAILEE FOR DAMAGE TO GOODS

Shoreland Freezers, Inc. v. Textile Ice & Fuel Co.[7] is an interesting and important case on the law of bailments. The plaintiff had delivered a quantity of frozen vegetables to the defendant for storage in its frozen food storage warehouse. Neither party inspected the vegetables at the time they were delivered for storage. Thereafter, vegetables were withdrawn from storage indiscriminately for several months and were found to be in good condition. Later, however, vegetables withdrawn were found to be frozen in a solid block and were therefore worthless.

The trial court directed a verdict in favor of the defendant, holding that there was no proof that the vegetables were in good condition when delivered to the defendant bailee. The Supreme Court held that the fact that the vegetables withdrawn in the first few months of storage were found to be in good condition gave rise to the reasonable inference that all of the vegetables were in good condition when delivered to the defendant. The court further held that a jury issue as to the negligence of the defendant arose from the inferences summarized above and from the further evidence that there was a considerable amount of clear ice on the storage room floor, indicating a rise in the temperature sufficient to allow the ice to melt and then re-freeze as ice, which would result in a partial thawing and re-freezing of the plaintiff's vegetables in a solid block.

The court adopted the rule that the damage of stored goods caused by the negligence of the bailee does not prevent his recov-

5. Holloway v. Holloway, 204 S.C. 565, 30 S.E.2d 596 (1944).
6. Messery v. Messery, 82 S.C. 559, 64 S.E. 753 (1909).
7. 241 S.C. 537, 129 S.E.2d 424 (1963).

ering storage charges, where he makes compensation for the damages.

The case contains a full, clear and precise statement of the substantive and procedural rules governing liability of a bailee under a bailment for mutual benefit.

DEFAMATION—LIBEL

In *Appliance Buyers Credit Corp. v. Baxley*[8] the plaintiff which had purchased conditional sales contracts from the defendants had sent a letter or letters to a customer or customers of the defendants requesting that all future payments on account be made direct to the plaintiff, and advising that the plaintiff could not be responsible for any future payments made to other than an authorized employee of the plaintiff. They also asked whether the customer records agreed with the plaintiff's and if not, requested information as to what payments had been made and to whom. In a suit for breach of contract, the defendants counterclaimed for libel. The Supreme Court reversed the trial court and sustained the plaintiff's demurrer to the counterclaim on the grounds that the acts complained of had been authorized by the contract between the parties and there had been no allegation nor showing of ill will, malice or malicious intent to injure the defendants.

DEFAMATION—DEFENSE OF QUALIFIED PRIVILEGE

Conwell v. Spur Oil Co.[9] is an excellent example of the operation of the defense of qualified privilege in the law of defamation. The secretary of the defendant corporation had written a letter to the plaintiff, manager of one of the defendant's stations, stating in effect that the plaintiff was short $5.68 in his account of premium cash which had not been entered on his daily report. A copy of the letter was sent to the defendant's district manager. The letter sent to the plaintiff was read by the assistant manager and by another employee. The plaintiff contended that the innuendo of the letter was that the plaintiff had sold merchandise and failed to account for it to the defendant and had thus committed the criminal offense of breach of trust. In the ensuing suit for libel, the jury's verdict in favor of the plaintiff

8. 241 S.C. 64, 127 S.E.2d 8 (1962). This case is also noted in the Pleading section at note 8.
9. 240 S.C. 170, 125 S.E.2d 270 (1962).

for actual damages found that the charge contained in the letter was false. However, the Supreme Court reversed the case and ordered judgment entered for the defendant upon the ground that even assuming the communication to be legally libelous, it was qualifiedly privileged, and there was no evidence of express malice, malice in fact, nor ill will of the defendant to the plaintiff, which would overcome the defense of qualified privilege. The court held the communication to be qualifiedly privileged, having all the essential elements of a conditionally or qualifiedly privileged communication, namely, good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.[10] The opinion contains an excellent discussion of the elements of qualified privilege and citation of authorities on the point.

EMPLOYER'S LIABILITY FOR INJURIES OF EMPLOYEE

It is somewhat surprising that even with widespread Workmen's Compensation, two cases in the Supreme Court this year dealt with the master's common law liability for injuries sustained by his employee in the course of employment. In both cases judgment was granted for the defendant employer as a matter of law.

In *Bellamy v. Hardee*[11] the plaintiff, employee of the defendant, was injured by a bumper jack which stripped and fell while the plaintiff was using it to raise a section of a dragline. The Supreme Court reversed the plaintiff's judgment for actual damages and ordered entry of judgment for the defendant. In searching the record for evidence of negligence sufficient to support the verdict, the court assumed that the defendant was initially negligent in furnishing only the automobile bumper jack for the employee's use, rather than a hydraulic jack. However, the plaintiff himself was thoroughly experienced and was in sole and complete charge of the operation; his judgment was regarded as superior by his employer; and he had never asked for different equipment, though his employer had offered to furnish whatever was needed. The court concluded that the plaintiff was barred by his own contributory negligence in continuing

10. *Id.* at 179, 125 S.E.2d at 275, quoting 33 AM. JUR. *Libel & Slander* § 126 (1942).

11. 242 S.C. 71, 129 S.E.2d 905 (1963). This case is also noted in the Agency section at note 11.

to use the bumper jack and in failing to make any definite request for, or effort to obtain, a more suitable jack. The doctrine of proximate cause is another ground for the decision: even if both parties were guilty of negligence, that of the plaintiff was the immediate, proximate cause of his injury, and that of the defendant was remote.

In *Jackson v. Powe*[12] the plaintiff had been injured while assisting in loading baled cotton on the truck of his employer, the defendant. The bale was being lowered by a hydraulic lift operated by an employee of the gin company, and the plaintiff was guiding it into place when it fell and injured him. The court affirmed a nonsuit, holding there was no proof of negligence on the part of the defendant, the defendant not being responsible for any negligence on the part of the lift operator who was employed by and under the control of the gin company.

NUISANCE

Winget v. Winn-Dixie Stores, Inc.[13] is a case which illustrates the conflict of rights arising from the spread of business into a residential district. The plaintiffs sought damages and an injunction against the defendant for the alleged nuisance in the location and operation of the defendant's large chain grocery super-market which was established next to the plaintiff's residence. The court held that the location of the business could not be held to constitute a nuisance, since the business was a lawful one and was located in an area zoned for retail business by the City of Sumter and determined by the City's Zoning Board to be suitable for a retail grocery.

In analyzing whether the operation of the store could be held to constitute a nuisance, the Supreme Court broke the plaintiff's complaint into its specific constituent elements and determined: 1) the normal increase of traffic and noise caused by customers coming and going is a natural concomitant of the operation of a business and therefore cannot constitute a nuisance; 2) the noise caused by the loud operation of trash trucks and street sweepers by the City of Sumter cannot be attributed to the defendant and therefore cannot constitute the basis of nuisance on the part of the defendant; 3) however, those acts and complaints not normal or necessary incidents of the operation of the business may con-

12. 241 S.C. 35, 126 S.E.2d 841 (1962). This case is also noted in the Agency section at note 10.

13. 242 S.C. 152, 130 S.E.2d 363 (1963). This case is also noted in the Property section at note 7.

stitute elements of nuisance, *e.g.*, fans blowing against the plaintiff's trees and shrubbery, floodlights casting bright glare over the plaintiff's property until late at night, obnoxious odors arising from the garbage, and paper and trash being permitted to escape onto plaintiff's property to an unusual extent.

The Supreme Court held that the trial court properly denied injunctive relief (such had become the law of the case) because the acts which would prove any basis for damages arising from nuisance in the operation of the business had been largely, if not entirely, discontinued.

The case was remanded for a new trial as to those acts of the defendants which would constitute grounds for the award of damages for nuisance.

TORTIOUS INTERFERENCE WITH CONTRACTUAL RIGHTS

Smith v. Citizens & So. Nat'l Bank[14] establishes and recognizes a limiting principle in regard to the tort known as malicious interference with a contractual relation, namely, that in order to constitute actionable interference with a contract, it must appear that the act complained of was the proximate cause of the injury or damage. Briefly, the complaint alleged the following. The plaintiffs and the defendant Sloane had been partners in a road building job. The plaintiffs owed the defendant C & S Bank $1,485.65, and the bank advised Sloane to issue a check for that amount jointly to the bank and the plaintiffs in his settlement with the plaintiff. The plaintiffs were forced to agree to this arrangement although they unsuccessfully urged Sloane to ignore the bank's demands. After securing the plaintiffs' written release on these enforced terms, Sloane repudiated the settlement and paid neither the bank nor the plaintiffs. The complaint further alleged that the bank by its demands interferred with the plaintiffs' contractual relation with Sloane and induced and coerced him to breach his contract with the plaintiffs. The lower court sustained the demurrer as to the defendant C & S Bank, holding that the plaintiffs' failure to receive from Sloane the amount due them resulted from Sloane's refusal to pay under any circumstances and not from the bank's directions as to disbursement of the funds. The Supreme Court affirmed, on the ground that the bank's act was not the proximate cause of the plaintiff's loss.

14. 241 S.C. 385, 128 S.E.2d 112 (1962). This case is also noted in the Pleading section at note 3.

STATUTE OF LIMITATION

In the factually novel case of *Brown v. Finger*[15] the plaintiff had recovered a verdict of $55,170 against the defendant, a physician, for loss of consortium of his wife and for recovery of his medical expenses incurred on her behalf as the result of the defendant's having wilfully and maliciously administered and made available narcotics to the plaintiff's wife, reducing her to an addict, and effectively destroying their marriage. The decision on appeals involved points of damages and procedural law. The court reversed and remanded the case for a new trial, pointing out that despite the adoption of the Married Women's Acts, the husband still retains his common law right to recover for the loss of the consortium of his wife caused by the wrongful act of a third person, although by statute the wife and not the husband is entitled to recover for the loss of her separate earnings.

The primary point of interest here is the application of the six-year statute of limitations to the facts. The action was instituted on December 13, 1954. The plaintiff's wife first began using narcotics under the defendant's advice and direction in 1947, and inferentially did not become addicted until 1949 or 1950. Of course, the statute of limitations commences to run only from the time that the cause of action accrues. The difficulty is when, at what point of time, does the husband's right to sue for loss of the services, society and companionship of his wife accrue? On this point the court held, in accordance with the better view, that the cause of action does not accrue until the loss of services and companionship actually occurs, and therefore it was a jury issue as to whether the plaintiff's claim was barred by the statute of limitations.

The court held that although the contributory negligence of the wife constituted a defense in derivative actions of this kind, such issue was not involved in the case since the defendant has not pleaded it.

RES JUDICATA AS BETWEEN JOINT TORT FEASORS

A single clear-cut legal issue, so rare in the majority of automobile cases, confronted the court in *Kinard v. Polk*[16]: If a passenger recovers judgment against both the driver of the automo-

15. 240 S.C. 102, 124 S.E.2d 781 (1962).
16. 241 S.C. 555, 129 S.E.2d 527 (1963). This case is also noted in the Pleading section at note 15.

bile in which he was riding and the other automobile, is that judgment res judicata so as to bar a subsequent suit by one of the co-defendants against the other? Our Supreme Court held that such a former suit was not res judicata and thus did not bar the second suit. The reason for this rule is that the parties were not adversaries in the first suit and had no opportunity to litigate the issues between them. That the co-defendants could have become adversaries in the first action by filing cross pleadings under the authority of Section 10-707 of the 1962 Code was held to be without legal significance in view of the permissive language of the statute.

NEGLIGENCE OF BOTTLER

In *Boyd v. Marion Coca-Cola Bottling Co.*,[17] the Supreme Court held that a jury issue was presented as to the defendant bottling company's negligence in selling bottles of Coca-Cola likely to explode on account of excess of pressure of gas, in failing to provide a bottle of sufficient strength, and in failing to use due care in filling the bottle. The plaintiff had been injured when a bottle of Coca-Cola bottled and sold by the defendant exploded while he was taking bottles from the crate and placing them in his drink box, cutting his face to the extent that ten stitches were required to close the wound. According to the plaintiff's testimony, another bottle from the same crate exploded about the same time as the one which injured him, and about two weeks later, another bottle of Coca-Cola exploded while undisturbed in the crate.

Of course, as pointed out by the court, the doctrine of *res ipsa loquitur* does not prevail in this state, and there must be proof of negligence on the part of the defendant, which may be by circumstantial as well as by direct evidence.

The *Boyd* case is in accord with prior authority to the effect that although the explosion of a single bottle of carbonated beverage, standing alone, would not be sufficient to make out a case of actionable negligence, where there is evidence of other instances of bottles filled, charged and distributed by the same bottler, exploding under substantially similar circumstances and reasonable proximity of time, the case should be submitted to the jury on the issue of negligence.[18]

17. 240 S.C. 383, 126 S.E.2d 178 (1962).
18. Merchant v. Columbia Coca-Cola Bottling Co., 214 S.C. 206, 51 S.E.2d 749 (1949).

PARTIAL ASSIGNABILITY OF PERSONAL INJURY CLAIMS

Doremus v. Atlantic Coast Line R. R.,[19] is an extremely important decision on the substantive law question of the partial assignability of personal injury claims and the dependent but more important procedural question of the removal of such suits from the state court to the United States District Court. Upon petition of the minor plaintiff's guardian ad litem to the Court of Common Pleas, approval and sanction was given for the assignment of a 1/100th interest in the minor plaintiff's cause of action for personal injuries unto one J. F. Davis, a party plaintiff who presumably was a resident of the state in which the defendant railroad is incorporated. The Supreme Court upheld the partial assignment against the defendant's attack, holding definitely for the first time that under South Carolina law a partial assignment can be made of a claim for personal injuries. The court upheld the rule that if a claim survives the death of the holder thereof, it is assignable. The general principle that survival is the test of assignability had been laid down by *Bultman v. Atlantic Coast Line R. R.*,[20] which involved property damage, and it was applied to personal injury claims in the *Doremus* case.

The technique of preventing removal of a tort suit to the United States District Court by partial assignment of the plaintiff's claim to a resident of the same state in which the defendant resides, thus defeating diversity of citizenship, has been often used in South Carolina, but has now been given judicial sanction under state law. This technique was fully discussed in a short treatise entitled "Guide to Removal and Its Prevention (In Code States)" written in 1948 by Thomas M. Boulware of the Allendale Bar.

LIABILITY FOR INJURY TO CUSTOMER OR BUSINESS GUEST

Jaudon v. F. W. Woolworth Co.[21] was a suit against a store owner to recover for personal injury to a customer. The plaintiff, a 75 year old woman, entered the Woolworth store in Charleston to buy a green plant to take to a sick friend. Not finding the item she wanted, the plaintiff summoned a saleslady who showed

19. 242 S.C. 123, 130 S.E.2d 370 (1963).
20. 103 S.C. 512, 88 S.E. 279 (1915).
21. 303 F.2d 61 (4th Cir. 1962).

her the entrance to the garden shop from the main store area, it was necessary to climb three 6½ inch stairs, to go through the two doors out a circular or fan shaped platform inside the plant department, and then to step down 6½ inches from the platform to the floor of the plant department. The defendant's saleslady held the door open for the plaintiff and did not point out the step-down. There was no sign warning of the step-down, as her attention was directed to the display in the storeroom. The plaintiff fell and fractured her hip, requiring hospitalization and the insertion of a steel nail. While in the hospital the plaintiff suffered a stroke which according to medical testimony was causally connected with the plaintiff's fall.

The Fourth Circuit Court of Appeals affirmed the action of the district judge, sitting without jury, in awarding the plaintiff $16,029.00 actual damages, holding that the evidence warranted a finding of the defendant's negligence in failing to warn plaintiff of the step-down either orally or by sign, and that the plaintiff was not contributorily negligent as a matter of law.

This reviewer originally intended to criticize the decision because it allowed the inattention of the plaintiff, or the diversion of her attention, to excuse her duty of exercising due care for her own safety and thus to destroy completely the defense of contributory negligence. However, the principle that forgetfulness or inattention may under some circumstances be excused and thus overcome contributory negligence has now been adopted by the South Carolina Supreme Court in *Connor v. Farmers & Merchants Bank*.[22] Although the *Connor* case is outside the period covered by this Survey, I will quote from the decision therein on the point in question:

> The general rule for determining whether forgetfulness by a plaintiff of a known danger constitutes contributory negligence is no different from the rule applied in other situations, that is, forgetfulness or inattention will amount to negligence if it amounts to a failure to exercise due care. The law recognized that the person of ordinary reason and prudence sometimes forgets, is sometimes inattentive, and is not perfect or infallible. Therefore, forgetfulness or inattention may be excused when the circumstances are such that a jury could reasonably conclude that a person of ordinary prudence, so situated, might have forgotten.

22. ___ S.C. ___, 132 S.E.2d 385 (1963).

> While forgetfulness of, or inattention to, a known danger may under certain circumstances be excused, it is recognized that a too liberal application of the principle can result in fraud and could completely destroy the defense of contributory negligence. Therefore, it is settled that mere forgetfulness or inattention is sufficient. It is not enough to say "I forgot." Neither is it enough to merely show that there was some diverting circumstances at the time. In order to keep forgetfulness of, or inattention to, a known danger from constituting contributory negligence as a matter of law, the evidence must be such as to give rise to a reasonable inference that the forgetfulness or inattention relied upon was induced by some immediate, substantial and adequate disturbing cause, to be determined in the light of the exigencies of the situation and the facts and circumstances of the particular occasion.[23]

There is no reason why the same principle here applied to overcome contributory negligence of a plaintiff would not also under proper circumstances excuse the negligence of a defendant.

Holliday v. Great Atl. & Pac. Tea Co.,[24] is another case in the widening area of the tort liability of a proprietor for injuries suffered by business guests. While walking at night from the A & P Store in Sumter to her daughter's car in the parking lot in front of the store, the plaintiff fell over a raised concrete median strip and suffered injuries. On appeal from a judgment in favor of the defendant granted by United States District Judge Timmerman notwithstanding the verdict for the plaintiff, the Court of Appeals reversed the case and remanded the case for entry of the $10,000.00 judgment in favor of the plaintiff. The appellate court held that the jury could properly have found that the defendant was negligent either in failing to repaint the median with yellow paint within the eight-month period preceding the injury when it had been "beaten off" the median's edge, or in failing to maintain proper lighting at night on the portion of the parking lot which it controlled. The court further held that the plaintiff was not contributorily negligent as a matter of law since she proceeded with caution, with one hand on a parked car and looking as carefully as she could for a "banana peel" or anything else that she might slip on.

23. *Id.* at 390.
24. 314 F.2d 682 (4th Cir. 1963).

RAILROAD LAW

Two decisions of note were rendered in the Survey period in the ever-important field of railroad law. *Doremus v. Atlantic Coast Line R. R.*[25] is the more important of the two. The 13-year old plaintiff recovered a verdict of 75,000.00 dollars actual damages and 25,000.00 dollars punitive damages (reduced by the trial judge from 50,000 dollars for the serious and substantial personal injuries which he sustained in a collision between the defendant's railroad engine and his brother's car in which he was riding as a passenger. Although both the usual highway department and the railroad warning signs were in place, the driver of the car testified that he did not see either of them because the sun was in his eyes and because they were partially obscured by vegetation, that he did not know of the presence of the crossing and that the first whistle blast was given when his automobile was approximately 125 feet from the crossing. Evidence showed that the crossing was obscured by vegetation, that the automobile was traveling 35 to 40 miles per hour, and that the train was traveling approximately 40 miles per hour despite a railroad rule limiting speed to 25 miles per hour at the crossing in question.

The Supreme Court held that the evidence of the defendant's negligence was sufficient to support the verdict and that the driver of the automobile was not guilty, as a matter of law, of gross or wilful contributory negligence imputable to his passenger, the minor plaintiff, so as to bar his recovery under Section 58-1004 of the 1962 Code.

The court held that not only was there evidence of the defendant's failure to give the signals required by statute, but of common law delicts which the jury could have found to be negligent, and wilful and the proximate cause of the collision. The court stated:

> Independently of the signal statute, Section 58-743 of the Code, it is the common law duty of the Railroad Company to give such signals as may be reasonably sufficient to view of the situation and surroundings to put individuals using the highway on their guard.[26]

On the question of the imputation to the minor plaintiff, the passenger, of the driver's contributory wrongdoing in failing to see the warning signs or hear or observe the train until he was

25. 242 S.C. 123, 130 S.E.2d 370 (1963).
26. *Id.* at 135, 130 S.E.2d at 375.

within 125 feet of the crossing, the court reasoned that the jury verdict was supportable upon two theories: (1) it was for the jury to determine whether his conduct amounted to mere inadvertence or whether it amounted to the gross or wilful negligence required by statute[27] to bar recovery by a passenger; (2) the jury could have found that the common law delicts of the defendant railroad were the proximate cause of the collision and that there was no failure to give the statutory signals which contributed to the collision as a proximate cause, in which latter case the wilful contributory negligence of the driver would be inapplicable.

The Supreme Court established a principle of railroad law heretofore unknown in this state which makes the plaintiff's knowledge of a crossing a crucial matter in railroad litigation by affirming the following jury instruction given in the *Doremus* case:

> I charge you that the duty of a traveler to look and listen for an approaching train when he knew of the existence of the crossing is very different from that of the traveler who is ignorant of the crossing's existence. Without minimizing the duty of a person approaching a railroad crossing to employ all of his senses for the purpose of ascertaining whether or not it is safe to cross, such duty does not exist until the traveler has knowledge, or by the exercise of reasonable care, should have knowledge that there is, in fact, a crossing. Otherwise, a person traveling upon a highway would be under a continuous duty to look and listen for a train regardless of where he was with reference to a railroad crossing.[28]

In the other case, *Gossett v. Piedmont & No. Ry.*,[29] the sole issue before the Supreme Court was whether the plaintiff truck driver was guilty of gross contributory negligence as a matter of law in failing to look to his left immediately before committing himself to enter upon the crossing where he was struck by the defendant's locomotive, since he could have seen the train in time to avoid the collision had he looked. The court affirmed the jury verdict for the plaintiff, holding that the plaintiff's failure

27. S.C. CODE § 58-1004 (1962).
28. Doremus v. Atlantic Coast Line R.R., *supra* note 25 at 146, 130 S.E.2d at 375.
29. 241 S.C. 501, 129 S.E.2d 362 (1963).

to look did not rise to the level of gross contributory negligence as a matter of law. The court reasoned as follows:

> Blakely's view of the track was obstructed until he was close upon it. He was entitled to rely to some extent upon the absence of the statutory signals and the failure of the crossing signal to flash a warning. It would be reasonable to infer that his vigilance was further blunted by the continued movement of traffic over the crossing as he drew near. It may also be inferred that he approached the crossing at a reasonable speed and undertook to verify the assurance of safety arising from the absence of signals by looking and listening before entering upon the crossing. Under the circumstances of this case, his testimony that he did look and listen cannot be disregarded as incredible. Instead, it lends support to the jury's finding that he was not entirely heedless.[30]

PROXIMATE CAUSE

Probably the most important single Torts case in this survey period is *Horton v. Greyhound Corp.*,[31] a major decision on the doctrine of proximate cause. As viewed by a majority of the Supreme Court the evidence was that the plaintiff's intestate was killed in a collision with a southbound Greyhound bus while he was riding as a passenger in a pick-up truck traveling north which pulled out to its left from behind a stopped vehicle signalling for a left turn. The evidence clearly showed that the collision occurred on the bus's side of the road but also that the bus was traveling at an excessive and unlawful rate of speed.

The trial judge directed a verdict for the defendants and on the plaintiff's appeal the sole question presented to the court was whether the evidence was susceptible of the reasonable inference that the excessive speed of the Greyhound bus proximately caused the collision.

After a thorough and searching analysis of the evidence, the court held:

> It is abundantly clear that the primary efficient cause of the collision was the unlawful act of the truck driver in turning his northbound vehicle into the southbound lane of travel, which was occupied by the approaching bus. It is equally

30. *Id.* at 507, 129 S.E.2d at 329.
31. 241 S.C. 430, 128 S.E.2d 776 (1962).

> clear that the only evidence of a negligent or unlawful act by the bus driver relates to excessive speed, which could not have resulted in harm to Scott if the truck had remained in its proper lane of travel. The concurrence of excessive speed with this primary, efficient cause of the collision does not impose liability on the defendants unless without it, the collision would not have occurred.[32]

The court further held that to support the inference that excessive speed proximately caused the collision, the plaintiff was required to produce "[*s*]*ome evidence* that if the bus had been operated at a reasonable speed it could have been stopped at some distance short of the collision point. . . ." Here there was no such evidence.

The decision attempts to lay at rest that specious reasoning which would make excessive speed a proximate cause of every collision, on the theory that the vehicle would not have been at the point where the collision occurred had it not been traveling at the speed which it traveled. In the words of the court:

> That speed was a contributing factor in placing the bus at a particular location on the highway when the emergency arose is without legal significance, because the defendants had the legal right to occupy that portion of the highway.[33]

In his dissenting opinion in the earlier case of *Spencer v. Kirby*,[34] Mr. Chief Justice Stukes recognized the same principle by stating that if the vehicle had been traveling even faster, it conceivably would have been beyond the point of collision at the instant of time when the adverse vehicle arrived there, and therefore it was illogical to say that the defendant's speed proximately caused the wreck.

The court thus emphasized the rarity of the situation in the *Horton* case:

> This is simply one of those rare cases in which the evidence, although sufficient to support an inference of concurrent negligence by the defendants, is insufficient to support a reasonable inference that without such negligence the collision would not have occurred.[35]

Mr. Justice Lewis dissented.

32. *Id.* at 438, 128 S.E.2d at 781.
33. *Id.* at 439, 128 S.E.2d at 781.
34. 234 S.C. 59, 106 S.E.2d 883 (1959).
35. Horton v. Greyhound Corp., *supra* note 31 at 441, 128 S.E.2d at 782.

The *Horton* case shows that the doctrine of proximate cause still retains vitality and cannot be neglected by attorneys for either the plaintiff or the defendant, and that it can be used successfully in the defense of a case by astute, careful and persuasive defense attorneys.

AGENCY

Two cases involved important points of the law of agency applied to automobile litigation, one on the family purpose doctrine, and the other on the admissibility of statements by a driver.

In *Porter v. Hardee*,[36] the automobile which caused the plaintiff's injuries was registered in the name of the defendant, Mr. Hardee, Sr., but had been purchased by Mr. Hardee, Jr. with his own money and registered in his father's name only because he (Jr.) was a minor. The car was not used for general use of the members of Mr. Hardee, Sr.'s family.

The Supreme Court reversed the judgment in the plaintiff's favor and ordered judgment entered for the defendant, holding that the family purpose doctrine could not be used to fasten liability on the defendant, since he did not maintain or furnish the vehicle for the use of his family. The court held that any presumption of the defendant's ownership arising from the registration was rebutted by clear proof that the son actually owned the car.

In the other case, *Marshall v. Thomason*,[37] the court held, over Mr. Justice Lewis's dissent, that statements made by the defendant's agent or employee pertaining to an automobile accident in which he was a participant are not admissible in evidence against the defendant, his principal, unless they are spontaneous and sufficiently contemporaneous with the time and place of the accident to bring them within the *res gestae* doctrine.

CIRCUMSTANTIAL PROOF OF IDENTITY OF TORT FEASOR

In *Crocker v. Weathers & West*[38] the Supreme Court held that the evidence made out, at most, a jury issue as to whether the plaintiff's intestate knew of the intoxicated condition of the automobile's driver and continued to ride as a guest in the car

36. 241 S.C. 474, 129 S.E.2d 131 (1963).
37. 241 S.C. 84, 127 S.E.2d 177 (1962).
38. 240 S.C. 412, 126 S.E.2d 335 (1962).

with such knowledge, and that it could not be held as a matter of law that he was contributorily reckless.

The case is an important one on the second question it involved, namely whether judgment should have been granted for the defendant on the ground that at the time the accident occurred, the plaintiff's intestate Kirby, and not the defendant West, was driving the car. Weathers, West and Kirby had been together in the car that Sunday afternoon, and when they left Wyatt's Service Station three and eight-tenths miles before the accident occurred, West had been driving, according to Wyatt's testimony. The investigating officer testified that Weathers had made conflicting and contradictory statements, saying that Kirby had been driving at the time of the accident and also saying that Kirby had been driving when they came to Wyatt's Station, that West drove when they left, and then they changed and Kirby was driving again.

The Supreme Court affirmed the verdict for the plaintiff which necessarily found that West had been the driver, holding that the credibility of witnesses and the weight to be given to their testimony are matters for the jury, and that the failure of Weathers and West to testify, without explanation, raises the presumption that their testimony would have been unfavorable to them.

Since there was no direct evidence as to the identity of the driver at the time of the accident, when analyzed, the basis for rationalizing the court's decision is this: the jury was justified in rejecting completely Weathers' two variations, as testified to by the investigating officer, under both of which Kirby was driving at the time he was killed; therefore, with Weathers' versions completely out of the case, the jury was justified in inferring that West was driving at the time of the accident, in view of Wyatt's testimony that West had been driving when the three left his station, three and eight-tenths miles before the fatal accident, since a condition proved to exist is presumed to continue, particularly in view of the failure of both West and Weathers to testify.

AUTOMOBILE LAW—INTERSECTION COLLISIONS

Of the several cases this year which arose from the factual situation of intersection collision, the most important is *Eberhardt v. Forrester*.[39] Mr. and Mrs. Eberhardt were proceeding east

39. 241 S.C. 399, 128 S.E.2d 687 (1962). This case is also noted in the Agency section at note 16.

along West Faris Road in Greenville in a Chrysler automobile when a Chevrolet automobile being driven north by Smith on Brookview Circle collided with the right front door of the Chrysler causing injuries to the Eberhardts. The Chevrolet was owned by Forrester and Clardy, used car dealers, and was being tried out by Smith, a prospective buyer. West Faris Road was a "through highway" within the applicable statute.[40] However, the stop sign on Brookview Circle at the entrance to West Faris Road was not in place and had evidently been removed and not yet replaced in the course of widening Brookview Circle. Smith was not familiar with the area, while Eberhardt was and knew that West Faris Road was a through highway.

The Supreme Court reversed the judgment for Smith, and remanded for a new trial, on the ground that the trial judge erred in instructing the jury that neither street was a through highway, and in charging Section 46-421 omitting the last sentence.[41] The appeal presented the novel and important question of the effect of the temporary removal of a stop sign, whether the temporary absence caused the principal road to lose its character as a through highway. The court stated the following general principles which represent the weight of authority:

> 1. Once a through street or arterial highway has been properly designated and appropriate signs have been erected, the preferred status of the highway is not lost merely because a stop sign is misplaced, improperly removed, destroyed or obliterated.
>
> 2. A motorist on a preferred highway is entitled to assume that a vehicle approaching on a secondary highway will stop for the intersection, unless he has knowledge of the absence of the sign, or he is otherwise put on notice that the vehicle on the intersecting street is not going to stop.
>
> 3. A motorist on a secondary highway is required to stop if he has knowledge of the nature of the preferred highway, even though the sign is absent.
>
> 4. A motorist on a secondary highway is not required to stop in the temporary absence of a stop sign, if he does not

40. S.C. CODE § 46-252 (1962).

41. S.C. CODE § 46-421 provides as follows: "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from different highway. When two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. The right-of-way rules declared in this section are modified at through highways and otherwise as stated in this article."

have knowledge of the character of the preferred highway, but may still be liable if he is otherwise negligent.[42]

Guthke v. Morris & Johnson[43] arose from a collision involving the Morris automobile and an automobile driven by Mrs. Johnson in which the plaintiff, Mr. Guthke, was riding. Mrs. Johnson was leaving Magnolia Cemetery near Charleston, entering Huguenin Avenue from behind a solid brick wall located 25 feet east of and parallel to Huguenin Avenue. According to her own testimony, Mrs. Johnson never came to a complete stop and never saw the approaching Morris automobile. When her daughter yelled and she heard Morris' brakes squealing, Mrs. Johnson tried to make it across the street. On Mrs. Johnson's appeal from the verdicts against her in favor of both the plaintiff Guthke and the defendant Morris, the court held that it was properly a jury issue whether Mrs. Johnson could have avoided the collision, even after she was belatedly alerted to the danger, by yielding the right-of-way rather than accelerating her speed.

The Supreme Court held that the trial court should not have charged Section 46-475 of the 1962 Code, which requires a motorist to stop when emerging from a driveway in a business or residence district, since the area of the collision was occupied by cemeteries; however, that no prejudice resulted to the appellant, since the factual situation which confronted Mrs. Johnson when about to enter the highway required her to stop in order to yield the right-of-way, and since the trial court had charged the appellant's request that a motorist entering a highway from a private gate or drive is required to yield the right-of-way to traffic in the highway, not necessarily to stop.

The statement contained in the opinion that Mrs. Johnson was required to stop in order to yield the right-of-way must be limited to the factual situation before the court, and in no way impugns the authority of such cases as *Spencer v. Kirby*[44] which construe Section 46-424[45] as not necessarily requiring a full stop in order to yield the right-of-way.

Hicks v. Coleman[46] involved the question of liability where the defendant's automobile while heading south came around the

42. Eberhardt v. Forrester, *supra* note 39 at 406, 128 S.E.2d at 691.
43. 242 S.C. 56, 129 S.E.2d 732 (1963).
44. 234 S.C. 59, 196 S.E.2d 883 (1959).
45. S.C. CODE § 46-424 provides as follows: "The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right of way to all vehicles approaching on such highway."
46. 240 S.C. 223, 125 S.E.2d 470 (1962).

right side of a large truck also headed south and struck the side of the plaintiff's automobile which had made a left turn heading from north to the west. The defendant on appeal contended that the plaintiff had turned left at the busy intersection directly in front and in the path of defendant's automobile which had the right-of-way. Since there was a question of speed on the part of the defendant's automobile, the Supreme Court affirmed, holding that all issues were properly jury issues.

Marshall v. Thomason[47] held that the plaintiff was not guilty of contributory negligence as a matter of law in attempting to turn behind the defendant's dump truck apparently attempting to enter the highway from the plaintiff's right, after it had stopped for a stop sign.

The court held that a jury issue existed in the case of *Young v. Bost*[48] as to whether the negligence of the driver of the car in which the plaintiff was riding was the sole proximate cause of the collision. The suit arose from an intersectional collision in which the driver of the car in which the plaintiff was riding was making a left turn.

Though *Norton v. Ewaskio*[49] arose from an automobile intersection collision, the issues raised on appeal primarily concern Practice and Procedure and Damages, and therefore will not be discussed here.

OTHER AUTOMOBILE CASES

In *Shearer v. DeShon*[50] the facts were substantially as follows: The plaintiff's decedent was a guest passenger in the front seat of a 1957 Volkswagen automobile owned by the defendant, Raymond DeShon and being operated by his minor daughter, Charlotte Faye DeShon. The car was traveling in a northerly direction on South Carolina Highway No. 421 in Aiken County about 8:40 p.m. on a dark, cloudy and rainy night. The plaintiff's intestate was killed in the collision which occurred between the DeShon Volkswagen and an automobile being driven in a southerly direction on South Carolina Highway No. 421 by the defendant Lyle, when Lyle made a left turn across the lane of travel of the DeShon automobile. There was some testimony that the speed of the DeShon automobile exceeded the posted speed

47. 241 S.C. 84, 127 S.E.2d 177 (1962). This case is also noted in the Agency section at note 17.
48. 241 S.C. 289, 128 S.E.2d 118 (1962).
49. 241 S.C. 557, 129 S.E.2d 517 (1963).
50. 240 S.C. 472, 162 S.E.2d 514 (1962).

limit of 35 miles per hour. The defendant Lyle testified that he did not see the Volkswagen until it was right upon him.

In the suit for the wrongful death of Glenda Shearer, against the defendants DeShon and the defendant Lyle, the jury returned a verdict in the sum of $10,000.00 actual damages against the defendants DeShon and $1,000.00 against Lyle.

Upon appeal by the defendant DeShon, the Supreme Court sustained the verdict of the jury finding recklessness on the part of the defendant DeShon upon the following grounds:

(1) There was evidence from which the jury could have determined that the defendant DeShon violated the speed statutes[51] and, of course, causative violation of an applicable statute constitutes actionable negligence and is evidence of recklessness, willfulness and wantonness;[52]

(2) There was evidence in the record that the driver of the DeShon car recklessly failed to keep a proper lookout and to have her automobile under proper control under conditions known to her immediately prior to and at the time and place of the collision. Under the authority of *Spurling v. Colprovia Prod. Co.*[53] if any testimony is introduced touching or supporting the allegations of failure to keep a proper lookout or have proper control, it would ordinarily be a jury question as to whether such conduct constitutes a reckless disregard of the rights of a passenger within the meaning of the guest statute.

There was testimony that immediately prior to the collision, the minor defendant DeShon, driver of the Volkswagen automobile took a cigarette and lit it and turned around to throw the matches to the witness who was riding in the back seat while driving with her elbows.

The appellants DeShon further contended that even if she were guilty of gross negligence or recklessness, there was no showing of a causal connection between such wrongdoing and the collision, and that she had no chance to avoid the collision because of the proximity of the Lyle car to hers when it was driven across her lane of travel. The Supreme Court stated that such was one inference which could be drawn from the testimony and estimates of the witnesses as to the proximity of the cars when the turn was made by Lyle. However, the court pointed out that other inferences were possible, namely that the Lyle car

51. S.C. CODE §§ 46-361-363 (1962).
52. Field v. Gregory, 230 S.C. 39, 94 S.E.2d 15 (1956).
53. 185 S.C. 449, 194 S.E. 332 (1937).

started turning slowly at Kirkland's Grocery shown to be 100 feet from the point of impact, and that there was testimony that Lyles stopped his car in the highway before making the turn, gave a proper signal and waited for one car to pass and then proceeded slowly across the highway. The court refused to say that the negligence of the defendant DeShon was not the proximate cause of the collision, but rather held that a jury issue as the proximate cause was presented.

The case also illustrates the unusual procedural rule in South Carolina that actual damages may be apportioned by the jury between joint tort feasors.

Eberhardt v. Forrester[54] is an important decision on the issue of liability of the owner of an automobile having defective brakes for furnishing it for another's use. The automobile in question was owned by Forrester & Clardy, used car dealers, who had loaned it to Smith to try out. The trial judge excluded testimony offered by the Eberhardts that when Clardy arrived at the scene of the accident, Smith told Clardy, "These brakes are the hardest on this car that I have ever seen—on any car I have ever driven," to which Clardy replied, "When the car left the shop the brakes were OK." The lower court had directed a verdict in favor of Forrester and Clardy on the ground that there was no proof of agency between them and Smith and also that there was insufficient evidence to go to the jury against them as bailors. The trial judge's ruling on the bailment point was based upon the authority of *Howle v. McDaniel*.[55] The Supreme Court held that the testimony offered by the Eberhardts was erroneously excluded, stating the principle of law involved as follows, quoted from an Alabama case[56]:

> In order to establish a prima facie case, *i.e.*, one sufficient to go to the jury, there must be some substantial evidence tending to show: (1) That the brakes were defective; (2) That such defective condition of the brakes was the proximate cause of the injury; (3) That the defendant knew or by the exercise of reasonable care ought to have known that the brakes were defective at the time the automobile was delivered.[57]

54. 241 S.C. 399, 128 S.E.2d 687 (1962). Discussed on another point at note 39 *supra*.

55. 232 S.C. 125, 101 S.E.2d 255 (1957).

56. Al DeMent Chevrolet Co. v. Wilson, 252 Ala. 662, 42 So.2d 585 (1949), in which a prospective purchaser was trying out a used car.

57. Eberhardt v. Forrester, *supra* note 39 at 408, 128 S.E.2d at 692.

Taylor v. South Carolina State Highway Dep't[58] is one of those rare cases in which the testimony and the inferences to be drawn therefrom, even under South Carolina's modified Scintilla Rule, are not sufficient to make a jury issue as to negligence on the part of the defendant.

On a clear morning in April, 1960, the plaintiff was riding as a passenger on U. S. Highway 321, several miles north of Columbia, traveling north in the righthand lane. A Highway Department motor grader was scraping a deposit of clay from a portion of the plaintiff's lane of travel, which clay had been dropped from trucks entering the highway from a clay pit. The motor grader had previously made one run from the entrance of the clay pit to the end of the deposit, which did not clear the highway, and the operator had commenced backing to get into position for another run. When a southbound automobile approached, the motor grader operator stopped in the northbound lane to wait for traffic to clear. He saw the car in which the plaintiff was traveling as it rounded a curve, some three or four hundred feet behind a sand truck. The sand truck came to a gradual stop behind the motor grader, after an interval of two or three seconds the southbound car passed in the opposite lane and then in another second or two the car in which the plaintiff was traveling ran into the rear of the tractor-trailer sand truck, killing the driver and injuring the plaintiff.

The plaintiff originally brought suit against the sand company and the Highway Department, but he took a voluntary non-suit as to the sand company. At the conclusion of all of the testimony the trial judge directed a verdict in favor of the Highway Department, from which the plaintiff appealed.

The Supreme Court held that the evidence did not raise a jury issue as to the negligence of the defendant State Highway Department. The plaintiff contended that the defendant's failure to provide signs or other warning of the work in progress violated a rule of the Highway Department, which amounted to negligence per se, and also violated the common law. The rule provided that when maintenance or reconstruction work was being performed upon the roadway and one-way traffic is being maintained, certain signs are required to be placed and flagmen posted. The Supreme Court held that this rule was not applicable, since the work in progress and the motor grader created a passing situation for northbound traffic rather than a one-way

58. 242 S.C. 171, 130 S.E.2d 418 (1963).

traffic situation within the meaning of the rule. The court further held that the failure to place signs or give other warning did not amount to negligence under common law because the morning was clear, the pavement was dry, traffic was not heavy and the work site was clearly visible for a long distance in both directions. The motor grader was in plain view of the plaintiff and the driver of his automobile when they rounded the curve some 1,000 feet south of it. In the words of the court:

> No sign was required to warn them of what was obvious at a greater distance than such signs, when appropriate, are required to be placed. If plaintiff and his companion were unaware of the presence of the motor grader on the highway, it must be attributed to their failure to keep a reasonable lookout, rather than to the failure of the operator to put out warning signs. Under the particular circumstances of this case no reasonable inference of negligence can be drawn from the absence of such signs.[59]

The court further dismissed the plaintiff's contention that the operator of the motor grader was negligent in continuing to back for some 50 feet after he observed the sand truck coming around the distant curve, the court stating that a significant interval of time before an emergency situation arose.

The court further held that the contended violation of Section 46-481 which prohibits stopping or parking a vehicle on the main travel part of the highway when practicable to stop or park off of such portion of the highway was inapplicable to this case, since motor vehicles and other equipment actually engaged in work upon the surface of the highway are exempted from requirements of this Section and from the other previsions of the Uniform Act Regulating Traffic.

The plaintiff further contended that the negligence on the part of the Highway Department caused the sand truck to stop in such a manner as to create a cloud of dust which obscured the vision of the driver of the automobile in which the plaintiff was riding and resulted in the collision. The court dismissed this contention, since the complaint did not allege that the Highway Department was responsible for such dust as was present, but rather alleged the presence of the dust as negligence on the part of the sand company. The court stated:

59. *Id.* at 179, 130 S.E.2d at 423.

> These allegations, together with all other specifications of negligence against the Sand Company, went out of the case when the voluntary non-suit was taken, leaving no reference whatever to dust in the specifications of negligence on which the case was tried.[60]

This point illustrates the fact that under our present procedure, pleadings are still all-important, and that the practitioner of negligence law must not only prove sufficient negligence to make a jury issue, but he must have alleged in his complaint the negligence which he proves.

In *Cain v. Beecher*[61] the plaintiff's testator was killed when struck by the defendant's tractor-trailer outfit being maneuvered in the driveway of the National Guard Armory at Georgetown. The Court of Appeals affirmed the verdict for the plaintiff, holding that in view of the plaintiff's testator's intoxication which was known to the defendants, of his presence around the equipment, and of his repeated attempts to enter the vehicle, a jury question was presented as to whether the defendants' agent, the lookout, sufficiently discharged his duty of ascertaining whether Cain's person was sufficiently far from the outfit not to be injured in its movement.

In *Rutland v. Sikes*[62] a wrongful death action, the evidence as to negligence was entirely circumstantial evidence, as the drivers of both dump trucks involved in the collision were killed in the impact. The fatal collision took place on a portion of the sand-clay surface of an interstate highway under construction entirely in the half of the roadway on the plaintiff's intestate's right. Also, an inference of excessive speed could be drawn from the extensive damage to both trucks, the deaths of both drivers and the hurling through the air of the loaded body of the defendant's truck. The appellate court sustained the jury verdict for the plaintiff, holding that even assuming the statutory law requiring motorists to drive to the right of the center line of any roadway to be inapplicable to a highway under construction not yet open to the general public, nevertheless driving a vehicle to the right of the roadway is required by common law. The court further held that the fact that the defendants' driver was on the wrong side of the road warrants an inference of fault on his part despite the speculation that some sudden emergency caused him to move over to that side.

60. *Id.* at 181, 130 S.E.2d at 424.
61. 310 F.2d 241 (4th Cir., 1962).
62. 311 F.2d 538 (4th Cir., 1962).

The court stated:

> The fact that there were no eyewitnesses does not deprive the finder of fact of the power of drawing reasonable inferences founded upon common experience from the circumstantial evidence, and the exercise of this power is not made insupportable by speculative assumptions that extraordinary circumstances might have existed, which, if established, would make the inference untenable.[63]

One point made by the defendants on appeal was that they were not liable under the borrowed servant doctrine. The defendants Sikes were furnishing trucks and drivers to a subcontractor, Braxton, who was engaged in moving sand, clay and earth. The driver in question, and others, were employed by the defendants and were subject to supervision and discharge by them. When Sikes was not present, his drivers would follow Braxton's instructions. Sikes' drivers were carried on Braxton's payroll but according to the testimony this was done solely to enable Braxton to certify that the drivers had been paid the federal minimum wage. Such payments by Braxton were deducted from the amounts due to the defendants on the basis of the amount of materials moved in their trucks. The appellate court held that Braxton did not specifically assume immediate control over Sikes' driver to an extent necessary to bring the borrowed servant doctrine into play and to relieve Sikes, the general employer, from responsibility for the acts of his servant.

McDonnell v. Floyd[64] primarily concerns the admissibility of evidence of an experiment, upon which question the case was reversed and remanded. However, the court held that the plaintiff was not barred by contributory negligence as a matter of law and that a jury issue was presented by facts showing that the plaintiffs' car was stopped headed east on a secondary road without lights, with the defendant Hucks' pick-up truck alongside it headed west, and that when the vehicle of the defendants Floyd and Cantrell approached, the plaintiff got behind her car before it was struck by the Floyd-Cantrell vehicle.

Gaines v. Thomas[65] is primarily of interest for the evidence questions it decides: Therefore, it will not be discussed under the topic of Tort.

63. *Id.* at 540-541.
64. 240 S.C. 158, 125 S.E.2d 4 (1962).
65. 241 S.C. 412, 128 S.E.2d 694 (1962).